United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1905.

386

No. 1600.

JAMES E. CLEMENTS, APPELLANT,

vs.

ALONZO S. MUTERSBAUGH, ADMINISTRATOR OF THE ESTATE OF ABRAHAM MUTERSBAUGH, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED AUGUST 30, 1905.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 6, 1905.

In the Court of Appeals of the District of Columbia.

JAMES E. CLEMENTS, Appellant,
vs.
ALONZO S. MUTERSBAUGH, Administrator of the Estate of Abraham Mutersbaugh, Deceased. } No. 1600.

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a Supreme Court of the District of Columbia.

ALONZO S. MUTERSBAUGH, Administrator of the Estate of Abraham Mutersbaugh, Deceased, Plaintiff,
vs.
JAMES E. CLEMENTS, Defendant. } No. 46684. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause to wit:

1 *Declaration.*

Filed January 7, 1904.

In the Supreme Court of the District of Columbia, the — Day of January, 1904.

ALONZO S. MUTERSBAUGH, Administrator of the Estate of Abraham Mutersbaugh, Deceased, Plaintiff,
vs.
JAMES E. CLEMENTS, Defendant. } No. 46684. At Law.

The plaintiff Alonzo S. Mutersbaugh to whom letters of administration have been duly issued by this court upon the estate of Abraham Mutersbaugh, deceased sues the defendant for money payable by the defendant to the plaintiff's intestate for goods bargained and sold by the plaintiff's intestate to the defendant; and for goods sold and delivered by the plaintiff's intestate to the defendant; and

for work done and materials provided by the plaintiff's intestate for the defendant, at his request; and for money lent by the plaintiff's intestate to the defendant; and for money paid by the plaintiff's intestate for the defendant at his request; and for money received by the defendant for use of the plaintiff's intestate; and for money found to be due from the defendant to the plaintiff's intestate on accounts stated between them.

And the plaintiff claims $582.50 with interest at the rate of 6 per cent. per annum from the 6th. day of August, 1903 said sum arising out of moneys collected by the defendant for the use of
2 the plaintiff's intestate, and interest thereon, according to the particulars of demand hereto annexed, besides cost of this suit.

CLAYTON E. EMIG,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

CLAYTON E. EMIG,
Attorney for Plaintiff.

Defendant's Amended Plea.

Filed May 4, 1904.

In the Supreme Court of the District of Columbia.

ALONZO A. MUTERSBAUGH, Administrator of the Estate of Abraham Mutersbaugh, Deceased, Plaintiff,
vs.
JAMES E. CLEMENTS, Defendant.
} Law. No. 46684.

Comes now the defendant, and with leave of the court first had and obtained, files this his amended plea to the declaration filed in the above entitled cause.

First. He does not owe the said plaintiff the said sum of money, or any part thereof, in manner and form as therein alleged.
3 *Second.* And for further plea says that he did not undertake or promise in manner and form as therein alleged.

* * * * * * *

BEACH & MATHER,
Attorneys for Defendant.

Endorsed: Leave granted. Harry M. Clabaugh, chief justice.

Joinder of Issue.

Filed May 16, 1904.

In the Supreme Court of the District of Columbia.

ALONZO S. MUTERSBAUGH, Adm'n'r, &c.,
vs.
JAMES E. CLEMENTS. } Law. No. 46684.

1. The plaintiff joins issue upon the defendant's first and second pleas.

2. Further, the plaintiff says that the defendant James E. Clements did within three years before the commencement of this suit, pay to the plaintiff's intestate on account of the indebtedness existing between them the sum of sixty dollars and undertook to pay the balance herein sued upon in the manner and form before explained.

4 3. The plaintiff further says that he does not owe the sum claimed in the defendant's fourth plea, and that neither he nor his intestate did at any time within three years next before the commencement of this suit undertake nor promise in the manner and form alleged in said fourth plea.

CLAYTON E. EMIG,
Att'y for Plaintiff.

Memorandum.

March 14, 1905.—Verdict for plaintiff in the sum of $97.93.

Judgment.

Supreme Court of the District of Columbia.

FRIDAY, *March* 31, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * * * *

ALONZO A. MUTERSBAUGH, Administrator of the Estate of Abraham Mutersbaugh, Deceased, Plaintiff,
vs.
JAMES E. CLEMENTS, Defendant. } At Law. No. 46684.

Upon hearing the motion of the defendant for a new trial, it is considered that said motion be, and hereby is overruled, and
5 judgment on verdict ordered: Therefore it is considered that the plaintiff recover against the defendant the sum of ninety-

seven dollars and ninety-three cents ($97.93) with interest thereon from this date, being the money payable by the defendant to the plaintiff, by reason of the premises, together with his costs of suit to be taxed by the clerk, and have execution thereof.

The defendant notes an appeal to the Court of Appeals, and the penalty of the bond to operate as a supersedeas is fixed in the sum of two hundred dollars.

Supreme Court of the District of Columbia.

MONDAY, *April* 3, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * * * *

ALONZO S. MUTERSBAUGH, &c.,
vs.
JAMES E. CLEMENTS. } At Law. No. 46684.

* * * * * * *

It is hereby ordered that the January term, 1905, of the supreme court of the District of Columbia be, and the same hereby is prolonged for the period of thirty-eight days, exclusive of Sundays, for the purpose of settling bills of exceptions in the above-entitled causes.

Memorandum.

April 20, 1905.—Appeal bond filed.

6 Supreme Court of the District of Columbia.

TUESDAY, *May* 16, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * * * *

ALONZO O. MUTERSBAUGH, Adm'r, Plaintiff,
vs.
JAMES E. CLEMENTS, Defendant. } At Law. No. 46684.

Upon motion of the defendant, the time within which to settle the bill of exceptions in this cause is hereby extended for the period of thirty days from this date; and further, that the time within which to file the transcript of record in the Court of Appeals be, and hereby is, extended until the 1st. day of July, 1905, inclusive.

* * * * * * *

TUESDAY, *June 13th*, 1905.

Session resumed pursuant to adjournment, Chief Justice Clabaugh presiding.

* * * * * * *

ALONZO O. MUTERSBAUGH, Adm'r, Pl't'ff,
vs.
JAMES E. CLEMENTS, Defendant. } At Law. No. 46684.

7 It is ordered that the time in which to settle the bill of exceptions in this cause be, and the same is extended until August 10th, 1905, and the time in which to file the transcript of record in the appellate court be, and the same is hereby extended until September 1st, 1905.

* * * * * * *

THURSDAY, *August 3rd*, 1905.

Session resumed pursuant to adjournment, Hon. Job Barnard, justice, presiding.

ALONZO S. MUTERSBAUGH, Adm'r,
vs.
JAMES E. CLEMENTS, Def't. } No. 46684. At Law.

Comes now the defendant herein by his attorneys and submitting the bill of exceptions taken at the trial of this cause, prays that the same be signed and made of record, now for then, which is accordingly done.

8 *Bill of Exceptions.*

Filed August 3, 1905.

In the Supreme Court of the District of Columbia.

ALONZO S. MUTERSBAUGH, Administrator of the Estate of Abraham Mutersbaugh, Deceased, Plaintiff,
vs.
JAMES E. CLEMENTS, Defendant. } Law. No. 46684.

Be it remembered that at the trial of the above entitled cause, which came on for hearing on the 13th and 14th days of March, A. D. 1905, before one of the justices of the supreme court of the District of Columbia, and after a jury was duly qualified and sworn, the plaintiff in order to prove the issues on his part joined, offered and gave evidence tending to prove as follows:

That the defendant in November of 1898, conducted a sale of personal chattels and effects in Alexandria county, Virginia, on behalf

of plaintiff's intestate, realizing therefrom the gross amount of $514.92, and that as a result thereof, the said defendant became indebted to the said plaintiff's intestate for the amount of money and promissory notes payable to the order of the defendant as attorney for Abraham Mutersbaugh, taken in payment by the said defendant Clements, with interest, for the goods and chattels so as aforesaid sold, and that he had failed to account therefor to said plaintiff's intestate, or to the said plaintiff, save in the amount of $60.

And thereupon, the defendant to maintain and prove the issues on his part joined, showed that the said promissory notes given for the auctioned goods and effects at the aforesaid sale, were
9 given plaintiff's intestate at the time of said sale, and were afterwards, on the day of sale, turned over by him to defendant for collection, and that he, said defendant, had been unable to collect all of them; there remaining uncollected, notes aggregating in face value $88.50.

And further to prove the issues on his part joined, defendant showed by the following-named parties, over the objections of plaintiff's counsel, that they had not paid him (said defendant) the amounts bid by them at said sale, by the amounts set opposite their respective names, for which he (said defendant) was entitled to a reduction, as follows:

John F. Morris reduction.....	$27.
Robert Walker "	73.45
Dr. Charles S. Beach "	18.37
	$118.82

that these reductions were due to different reasons shown as existing between these parties and plaintiff's intestate, and although included in the gross amount of said sale of $514.92, really formed no part of the account as between said plaintiff's intestate and defendant.

And further to prove the issues on his part joined, defendant gave testimony tending to show the following disbursements made by him on behalf of said plaintiff's intestate in connection with the said sale:

Auctioneer's fee—Payne.....	$5
Printer's bill for posters—Yates.....	$4
	$9

and on cross examination admitted that a receipt for $5.00 auctioneer's fee, offered by the plaintiff's intestate bore the genuine signature of said Payne.

10 And further to maintain and prove the issues on his part joined, defendant offered evidence tending to prove he had arranged with the auctioneer to conduct the said sale, had prepared and had had printed and posted around the country-side the advertising posters for this sale; that he had written and spoken to a

number of the county residents personally to interest them in the sale; had attended the sale and afterwards accepted as attorney the collection of the promissory notes given for a good deal of the effects sold, upon a commission, which, upon the usual basis of ten per cent. of the gross amount bid at the sale, amounted to the sum of $51.49.

And further to prove the issues on his part joined, defendant testified that he had collected in cash on day of sale, on items of less than $10. an amount aggregating $68.90, which, together with all other money or moneys thereafter collected, he had paid to plaintiff's intestate, or plaintiff, at various times, and in various amounts, as follows:

Cash Paid Abraham Mutersbaugh.

1898—Dec. 3, $10.; Dec. 17, $8.
1899—Apr. 18, $10.; May 1, $10.; July 19, $5.; July 26, $5.; July 26, $5.; Sept. 22, $50.; Oct. 9, $6.; Oct. 9, $10.;
1900—Jan. 5, $10.; Jan. 31, $10.; Feb. 28, $8.; March 21, $6.; May 3, $5.; June 16, $5.; July 3, $5.; Aug. 3, $5.; Oct. 2, $5.; Nov. 2, $5.; Dec. 5, $5.;
1901—Jan. 3, $5.; Mar. 14, $5.; May 2, $5.; July 5, $5.; Nov. 7, $5.;
1902—Mar. 6, $5.; April 9, $5.; July 7, $5.; Aug. 4, $5.; Sept. 2, $5.; Oct. 9, $5.; Nov. 1, $5.; Nov. 8, $5.; Dec. 19, $10.;
1903—May 6, $5.; July 2, $40.; Aug. 6, $20.

Making a total of $328.00.

11 And further the defendant, to maintain and prove the issues on his part joined, offered to prove by an expert accountant, who had calculated the same, the interest to which he (said defendant) was properly entitled to on the various amounts thus paid to plaintiff's intestate, or plaintiff, which evidence the court refused to admit, to which ruling exception was duly taken, and was then and there noted by the court upon its minutes.

The court thereupon instructed the jury that if they believed from the evidence that the defendant had intentionally and negligently failed to collect the unpaid and uncollected notes, for which he was claiming credit, that they should disallow said credit to him, to which the defendant then and there, before the retirement of the jury, excepted; which exception was duly noted by the court upon its minutes.

Thereafter and before the jury had retired to consider of their verdict counsel for the defendant asked leave for both parties to put a statement or memorandum in their hands to show the respective amounts proved or claimed by them, as the absence of such a guide necessitated the jury guessing as to the various amounts properly due from one to the other of the parties litigant, which request, when objected to by counsel for plaintiff, on the ground that his statement was not in as good shape as that offered by the defendant, was refused by the court, to which ruling an exception was taken, and then and there noted by the court upon its minutes.

Said exceptions, as stated in the foregoing bill of exceptions, were duly noted by the justice presiding upon his minutes at the trial of the above case, and the same is accordingly signed, sealed and made a part of the record, therein this 3rd. day of August 1905, *nunc pro tunc.*

12

JOB BARNARD, *Justice.*

This bill of exceptions is in accord with my recollection of the facts, and satisfactory.

CLAYTON E. EMIG.

June 13, 1905.

Order for Record on Appeal.

Filed August 3, 1905.

In the Supreme Court of the District of Columbia, the 3rd Day of August, 1905.

ALONZO S. MUTERSBAUGH, Ad'm'r, etc.,
vs.
JAMES E. CLEMENTS.
} At Law. No. 46684.

The clerk of said court will please have record for Court of Appeals, as follows: Declaration; first and second pleas of defendant's amended plea, filed May 4, 1904; joinder of issue thereon, filed May 16, 1904; mem. of verdict; judgment, extension of term to settle exceptions; mem. of appeal bond; bill of exceptions.

LEONARD J. MATHER,
Attorney for Defendant.

13 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 12 inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript in cause No. 46,684, at law, wherein Alonzo S. Mutersbaugh, &c., is plaintiff and James E. Clements, is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 25″ day of August, A. D. 1905.

J. R. YOUNG, *Clerk,*
By FRED. C. O'CONNELL, *Ass't Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1600. James E. Clements, appellant, *vs.* Alonzo S. Mutersbaugh, administrator of the estate of Abraham Mutersbaugh, deceased. Court of Appeals, District of Columbia. Filed Aug. 30, 1905. Henry W. Hodges, clerk.

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1905.

No. 1600.

JAMES E. CLEMENTS, APPELLANT,

vs.

ALONZO S. MUTERSPAUGH, ADMINISTRATOR OF THE ESTATE OF ABRAHAM MUTERSPAUGH, DECEASED.

Brief of Appellee.

The plaintiff's intestate employed the appellant to conduct a certain sale of personal chattels on his farm in Alexandria County, Virginia. The sale took place about November 10, 1898, on which appellant received for the plaintiff's intestate the sum of $68.90 in cash, and also certain promissory notes payable to the order of the appellant as attorney for the plaintiff's intestate or the unpaid purchase price, aggregating a total of $514.92. The appellant admitted at the trial that he had received in cash $68.90 for said goods for the plaintiff's intestate on the day of the sale, and contends that he had arranged with the auctioneer to conduct said sale, had printed and posted around the countryside the

advertising posters; and afterwards he accepted as the attorney the collection of the promissory notes, given for a good deal of the effects sold (Record 6 and 7), and he further contended at said trial " that the said promissory notes given for the auctioned goods were turned over to the defendant for collection, and that he had been unable to collect all of them, there remaining uncollected notes aggregating the face value of $88.50."

While the plaintiff in his declaration claimed the sum of $582.50, the only proof adduced by him were admissions and partial payments made by the appellants prior to the institution of said suit. Taking the sum of $514.92 admitted by the appellant to have been the gross amount realized from said sale, and crediting said sum with $68.90, representing the cash payments received November 10, 1898, there remained unpaid the several promissory notes. Appellant contends (Rec. 6) that he had been " unable to collect all of them, there remaining uncollected the sum of $88.50." It is established by the appellant himself that he received the sum of $514.92, as follows: $68.90 on day of sale and promissory notes for the balance of the total sale of $514.92, all of which was collected except the small sum of $88.50, which amount remained uncollected by the appellant, but the appellee contends that the appellant was negligent in collecting said balance, the notes being payable to the order of appellant, and good excuse was offered for not collecting them. The total amount received by the appellant, therefore, was $514.92, less the $88.50 uncollected upon said notes.

The Court instructed the jury upon said claim, "That if they believed from the evidence that the defendant had intentionally and negligently failed to collect the unpaid and uncollected notes, for which he was claiming credit, that they should disallow said credit." It is submitted that this instruction is proper.

The evidence before the jury was, that the general management of the said sale, and the collection of said notes, payable to the appellant, as attorney for the plaintiff's intestates had been accepted by the appellant in 1898, and that part had not been collected at the trial of said cause in 1903. There can be but one conclusion that either the appellant as attorney for the plaintiff's intestate was negligent when he accepted the notes in payment of the chattels sold or in failing to collect said notes at maturity.

It is impossible for this Court to reach any conclusion as to what effect the instruction of the Court had upon said jury.

The Court did not direct the jury not to allow said cause. So far as the record discloses they may have allowed the credit of $88.50 to the appellant.

At the trial the appellant adduced certain witnesses who testified over the objection of the plaintiff's counsel, that they had entered into a certain understanding with the plaintiff's intestate, whereby certain amounts bid by them on said day of sale aggregating $118.82 should not be regarded a sale, but be deducted from said gross amount of $514.92. It is submitted that this credit should not be allowed for two reasons, first, be-

cause the appellant admitted at the trial that he had received all of the $514.92 except the sum of $88.50 and if received by the appellant he should account for the same to the plaintiff; second, the evidence deduced was incompetent under section 1064 of the Code of this District. The purpose of said section being to prevent any party to a cause, or a witness testifying in relation to transactions had by the deceased party thereto.

It would be doubly unfair to the deceased to admit the testimony of said witnesses, Morris, Walker and Beach, to this cause; it would deprive the plaintiff of the intestate's denial thereto; and second, because it charges the plaintiff's intestate with entering into an unlawful agreement, void as against public policy. If said witnesses could not testify in reference to said matter in proceedings in which they were personally parties, it would seem that the spirit of the law would equally disqualify said witnesses from testifying to said facts in the proceedings instituted on behalf of the estate of the plaintiff's intestate.

The appellant begins his argument with the contention that "He is aggrieved and considers the verdict of the jury a reflection upon his honesty." It is difficult to imagine how twelve disinterested good men, sworn to do their duty could reach any other conclusion. The only expenses incurred as general manager of said sale and attorney for the plaintiff's intestate are two items, one the auctioneers fee of $5.00 and the other $4.00 for printing posters. While on cross-examination the appellant admitted that the receipt offered by the plaintiff

for $5.00 bore the genuine signature of said auctioneer for services rendered by him at said sale. Referring to page seven of the Record we have the admission by the appellant that he received on the day of the sale on November 10th, 1898, the sum of $68.90, of which sum no account to his principal appears until the 3d day of December following when $10.00 was paid. Then on December 17th the odd sum of $8.00, then no further payments were made or any excuse offered for deferring said payments, except a few minor payments, until April and May, 1899. It is worthy of note that on July 19th of the same year $5.00 was paid, and again on the 26th of July another payment of $5.00, and yet again on the same day an additional payment of $5.00, and then no further payments were made until September the 22d, when $50.00 was paid, being more than nine months after the day of sale and after the maturity of the notes received by said appellant on day of sale.

In the absence of proof by the appellant it is reasonable to assume that all of said $514.92, except the $88.50, had been paid to the appellant at maturity, on the 22d of September, 1899. Referring again to the plaintiff's grievances and what he considers a reflection upon his honesty, counsels submits that if the grievances and reflection as to his honesty indicated serves as the only motive of the appellant to perfect this appeal, any doubt with this Court as to whether or not the appellant has a right to feel aggrieved will be instantly dispelled upon a further consideration of the partial payments made by the appellant to the plaintiff's intestate as appears on

page 7 of the Record. Whatever may have influenced the jury in awarding the small verdict of $97.93, in favor of the plaintiff, it is safe to say that said verdict conceded to the appellant all the credits to which he was entitled.

Referring briefly to the appellant's first assignment of errors it is but necessary to say that the record does not show that the Court instructed the jury that they should not take into consideration the interest which the appellant claimed he was entitled to on account of various amounts paid to plaintiff's intestate, but simply refused to permit a certain witness to testify as an expert accountant, but said record does not show the grounds upon which the Court below declined to permit said witness to testify. Counsel is not so sure that the appellant was entitled to the payment of interest on the deferred partial payments, in this case, because said appellant had received said funds belonging to the plaintiffs intestate long before he remitted partial payments and to allow said appellant interest upon said payments would be permitting him to take advantage of his own wrong. Again it does not appear in the record what disposition the jury made of the question of interest claimed by the appellant so far as this Court is informed the jury may have calculated said interest upon said payments. They were certainly at liberty and competent to do so.

Referring briefly to the second assignment of errors in not permitting some memorandum or statement, showing

the account between the parties to be taken to the jury room, it is but necessary to say that the jury arrived at such a verdict as seems fair and best. It is not evident that the jury was incompetent to calculate the amount due the respective parties. It is preposterous to contend that the jury was required to guess at their verdict in the matter relating to so small a claim and in reference to a matter concerning which so few witnesses testified.

It is submitted that the record in this cause puts the appellant in a very unenviable light. It is not the verdict of the jury but the statement of the appellant (R. 7) that reflects upon his honesty. No agent, whatever be his relations with the principal, has a right, nor stands above reproach, who undertaking the general supervision of conducting an affair, receives more than $68 in cash and promissory notes payable to the agent's order for the balance can afford to withhold funds and appropriate same to his own use, then settle with his principal in installments such as those indicated in the appellant's statement, without offering a satisfactory excuse for deferring the payments. There is but one conclusion that can flow from his action, namely, that he appropriated to his own use the funds belonging to the plaintiff's intestate from the day he received said funds and covered his misappropriations by "jollying" the plaintiff's intestate by the small payments consisting of odd sums varying from $5, $6, $8, $10 to $20, some of which were paid two on the same day and others at intervals of almost six months. It does appear to the appellee that

whatever may be the weight of the appellant's technical contention the justice of this cause has been attained though the verdict was small. Therefore the verdict of the jury, confirmed by the trial court, in overruling a motion for a new trial should stand.

Respectfully submitted,

CLAYTON E. EMIG,
Attorney for Appellee.